THE ATTORNEY GENERAL OF TEXAS

November 20, 1989

JIM MATTOX
ATTORNEY GENERAL

Honorable Charles W. Chapman
Criminal District Attorney
Hays County Courthouse, Suite 208
San Marcos, Texas 78666

LO-89-97

Dear Mr. Chapman:

Section 43.23(f) of the Penal Code states as follows:

> (f) A person who possesses six or more obscene devices or identical or similar obscene articles is presumed to possess them with intent to promote the same.

Definitions of "promote" and "obscene device" are given in subsections 43.21(a)(5) and (7) of the Penal Code.

You inform us that you question the constitutionality of this presumption and ask the following question:

> Is Subsection (f) of Section 43.23 void because it encourages arbitrary and discriminatory enforcement, and could not be sustained under constitutional scrutiny?

Because you doubt the constitutionality of this provision, you are reluctant to make the charging decision on a matter that has arisen in Hays County. You present a situation in which a person kept in his home "devices, video-tapes, and magazines" that probably would be considered obscene. These items, more than six in number, were seized pursuant to a search warrant. You state that there "appears to be no direct, timely documentation or proof that the person possessed the items with the intent to promote them." The state is left with the statutory presumption of intent to promote if it wishes to charge the person with the Class A misdemeanor prescribed by subsection 43.23(c) of the Penal Code. We assume that more than six obscene devices as defined in subsection 43.21(a)(7) were found, since the presumption applies only to such devices, and not to obscene materials or a combination of obscene devices and materials. See Penal Code § 43.21(a)(1),(2) (defining "obscene" and "material").

Although the courts have addressed the constitutional validity of section 43.23(f), your question remains unsettled. Soon after the 1979 revisions of sections 43.21 and 43.23 of the Penal Code, lawsuits were brought in the federal district courts for the Northern and the Southern Districts seeking to enjoin prosecutions under these provisions. The federal courts determined that the provisions were constitutional and their decisions were appealed to the fifth circuit. In Red Bluff Drive-In, v. Vance, 648 F.2d 1020 (5th Cir. 1981), cert. denied; 455 U.S. 913 (1982), the fifth circuit affirmed the judgments below with certain exceptions. It vacated the portions of each judgment that upheld specific provisions of the statute, including the provisions that define "promote," Penal Code § 43.23(a)(5), and establish the presumption you inquire about. Id. § 43.23(f). The fifth circuit stated that "although each of these provisions presents a troublesome question of constitutional law, a decision on the merits would be inappropriate at this time." Red Bluff Drive-In, supra, at 1025. The court abstained on these provisions, "pending an opportunity for narrowing and clarifying state court construction." Id.

A Texas court of appeals has held that the presumptions created by sections 43.23(e) and (f) of the Penal Code were unconstitutional as in violation of the First, Fifth and Fourteenth Amendments to the United States Constitution. Hall v. State, 646 S.W. 489 (Tex. App.- Houston [1st Dist.] 1982) rev'd on other grounds, 661 S.W.2d 101 (Tex. Crim. App. 1983). Although the court of appeals found sufficient evidence to convict without application of the presumptions, it found an error in the charge to the jury with respect to the presumptions and remanded the case to the trial court. On review, the Court of Criminal Appeals held that the error in the charge to the jury was not reversible error, because the evidence was sufficient to convict. Hall v. State, 661 S.W.2d 101 (Tex. Crim. App. 1983) (en banc) (per curium). Thus, the court stated, "we need not, and do not, reach the holding that § 43.23(f), as well as section 43.23(e), is unconstitutional." Id. at 102. Section 43.23(e), which establishes a presumption that a person who promotes obscene material or an obscene device does so with knowledge of its content and character, was held unconstitutional as infringing on a First Amendment right in Davis v. State, 658 S.W.2d 572 (Tex. Crim. App. 1983) (en banc).

Judge Teague, who authored the opinion in Davis v. State, wrote a concurring opinion in Hall v. State in which he discussed the correctness of the court of appeals' opinion on sections 43.23(e) and (f). He pointed out that presumptions are usually said to be either mandatory or

permissive. A mandatory presumption shifts the burden of proof from the prosecution to the defendant and is therefore a per se violation of the due process rights of the accused. A permissive presumption allows, but does not require, the trier of fact to infer the elemental or ultimate fact from the proof offered. It places no burden on the accused. A permissible presumption may violate the accused's due process rights if there is no rational connection between the fact proved and the ultimate fact presumed, or if the inference of one from proof of the other is arbitrary because of a lack of connection between the two in common experience. Hall v. State, 661 S.W.2d at 104-06 (Teague, J., concurring); see generally Attorney General Opinion JM-456 (1986).

Judge Teague concluded that the presumptions in sections 43.23(e) and (f), as applied to the cause under consideration, were not unconstitutional. 661 S.W.2d at 106. In addition to instructing the jury on the two statutory presumptions, the trial court instructed the jury on the provisions of section 2.05 of the Penal Code, which describes the effect of a presumption established by a Penal Code provision. Moreover, the charge to the jury did not permit the burden of proof to be shifted. On the facts of this case, Judge Teague argued, the presumptions did nothing more than state to the jury what "it could have inferred from common sense and experience." Id. at 105.

In Ybarra v. State, 762 S.W.2d 368, 370 (Tex. App. - San Antonio 1988, no pet.), the court observed that section 43.23(e) had been ruled unconstitutional in Davis v. State, supra. It went on to say in dicta: "As Section 43.23(f) deals with the same kind of presumption overruled in Davis, it is also apparently unconstitutional." Id. Since this statement was unnecessary to the disposition of the case, and since the Court of Criminal Appeals explicitly did not address the constitutionality of section 43.23(f), the Ybarra dicta does not settle the question you ask.

The opinions in Hall v. State suggest to us that section 43.23(f) may be constitutionally applied in some cases, depending on what it adds to the evidence presented to the jury. Whether or not it can be constitutionally applied in your case requires an evaluation of the evidence of the case, which cannot be done in the opinion process. It is within your responsibility as criminal district attorney to evaluate the evidence and the role that the presumption would have in this case. If you doubt that the individual has committed an offense for which he can be constitutionally punished, you certainly do not have to charge him. See generally, 63A Am. Jur.2d Prosecuting

Attorneys § 24 (prosecutor's discretion to decide whether or not to prosecute).

Very truly yours,

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